

CIVIL SERVICE COMMISSION MINUTES

April 2, 2003

A meeting of the Civil Service Commission was held at 2:30 p.m., in Room 310 at the County Administration Building, 1600 Pacific Highway, San Diego, California.

Present were:

Barry I. Newman
Sigrid Pate
Marc Sandstrom
Gordon Austin
A.Y. Casillas

Mary Gwen Brummitt, as an outside hearing officer

Comprising a quorum of the Commission

Support Staff Present:

Larry Cook, Executive Officer
Ralph Shadwell, Senior Deputy County Counsel
Selinda Hurtado-Miller, Reporting

CIVIL SERVICE COMMISSION MINUTES
April 2, 2003

1:30 p.m. CLOSED SESSION: Discussion of Personnel Matters and Pending Litigation

2:30 p.m. OPEN SESSION: Room 301, 1600 Pacific Highway, San Diego, California 92101

PRE-AGENDA CONFERENCE

<u>Discussion Items</u>	<u>Continued</u>	<u>Referred</u>	<u>Withdrawn</u>
<u>3,4,5,6,7,8,9</u>			

COMMENTS Motion by Pate to approve all items not held for discussion; seconded by Sandstrom. Carried.

CLOSED SESSION AGENDA
County Administration Center, Room 458
(Notice pursuant to Government Code Sec. 54954.2)
Members of the Public may be present at this
location to hear the announcement of the
Closed Session Agenda

A. Mary Gwen Brummitt, Outside Hearing Officer: **Charles Lo**, Supervising Clerk, appealing an Order of Suspension and Charges from the Health and Human Services Agency.

B. Commissioner Austin: Richard L. Pinckard, Esq., on behalf of **2003/0003***, Deputy Sheriff, appealing an Order of Termination and Charges from the Sheriff's Department.

C. Mary Gwen Brummitt, Outside Hearing Officer: Daniel Marshall, Esq., on behalf of **Gerald Hall**, former Public Defender Investigator III, appealing a Final Order of Removal and Charges from the Department of the Public Defender.

REGULAR AGENDA
County Administration Center, Room 301

NOTE: Five total minutes will be allocated for input on Agenda items unless additional time is requested at the outset and the President of the Commission approves it.

MINUTES

1. Approval of the Minutes of the regular meeting of March 19, 2003.
Approved.

CONFIRMATION OF ASSIGNMENT

2. Commissioner Sandstrom: Wendell Prude, S.E.I.U. Local 2028, on behalf of **John Neal**, former Certified Nurse Practitioner, appealing an Order of Termination and Charges from the Sheriff's Department.

Confirmed.

DISCIPLINES

Findings

3. Mary Gwen Brummitt, Outside Hearing Officer: **Charles Lo**, Supervising Clerk, appealing an Order of Suspension and Charges from the Health and Human Services Agency.

FINDINGS AND RECOMMENDATIONS:

Employee was charged with Cause I - Conduct unbecoming an officer or employee of the County; Cause II - Insubordination (failure to appear at a meeting directed by supervisor); Cause III - Absent without authorized leave (failure to report to work and failure to call in to report absence); and Cause IV - Discourteous treatment of the public or other employees.

Employee has been employed in the Agency for approximately 6 years. Since December 2000 he held his current supervisorial position and is assigned to the North Coastal Family Resource Center in Oceanside. Employee had no prior formal discipline, however, he had been verbally counseled regarding his interaction with others, which has been perceived as combative and aggressive. The bulk of the charges set forth in the Final Order of Suspension relate to communications between Employee and his supervisor on September 3 and 4, 2002. At the commencement of the hearing, the Agency withdrew Cause I (G). Employee admitted the facts in Cause II but disputed the conclusion drawn therefrom. Employee's performance appraisal, as well as his promotion to supervisor indicates that he is an intelligent and dedicated staff member. At the hearing, he presented his position aggressively and was at times argumentative, although he stayed within the boundaries of reasonable advocacy. Several times he forthrightly admitted the actual errors.

The Agency's testimony and evidence was credible and revealed a productive employee who has behaved inappropriately. The hearing officer found that the Employee needs to focus less on his perception of unfairness or persecution and more on repairing and maintaining constructive workplace relationships and understand the perception of his fellow employees and supervisor.

Employee is guilty of Cause I, Cause II, Cause III, and Cause IV. Taking all written and oral evidence into consideration, the undersigned outside hearing officer concludes that the proven charges warrant more than a three (3) workday suspension. It is therefore recommended that the Final Order of Suspension and Charges suspending Employee for three (3) workdays be amended to a five (5) workday suspension; that the Commission read and file this report; and that the proposed decision shall become effective upon the date of approval by the Civil Service Commission.

**Motion by Newman to approve Findings and Recommendations;
seconded by Sandstrom. Carried.**

4. Commissioner Austin: Richard L. Pinckard, Esq., on behalf of **2003/0003***, Deputy Sheriff, appealing an Order of Termination and Charges from the Sheriff's Department.

FINDINGS AND RECOMMENDATIONS:

The matter of the appeal of 2003/003 was duly noticed and came on for hearing on March 20, 2003. Richard Pinckard, on behalf of the

Appellant, requested that this hearing be closed to the public pursuant to California Penal Code Section 832.7, to protect the confidentiality of Appellant's peace officer personnel records. After hearing from Attorneys Richard Pinckard, John Madigan, and Guylyn Cummins, the hearing officer determined that the hearing would be closed to the public.

At the beginning of the hearing, John Madigan, Esq., representing the Department, informed the hearing officer that the parties had entered into a written stipulation. The hearing officer reviewed the stipulation and believes that the public would be best served if the Commission accepts the stipulation and by reference incorporates the terms and conditions therein. It is therefore recommended that the written stipulation dated March 17, 2003 be approved by the Civil Service Commission; that the Commission accepts the withdrawal of Employee's appeal as set forth in the stipulation; that the Commission read and file this report; and that the proposed decision shall become effective upon the date of approval by the Civil Service Commission.

**Motion by Austin to approve Findings and Recommendations;
seconded by Pate. Carried.**

5. Mary Gwen Brummitt, Outside Hearing Officer: Daniel Marshall, Esq., on behalf of **Gerald Hall**, former Public Defender Investigator III, appealing a Final Order of Removal and Charges from the Department of the Public Defender.

Daniel Marshall, Esq. thanked Commissioner Brummitt for her professional handling of this matter and for the quick turn-around regarding her proposed decision.

FINDINGS AND RECOMMENDATIONS:

Employee was charged with Cause 1 - dishonesty (spent majority of sick leave time conducting personal non-county activities in Mexico relating to personal fishing business); Cause 2 - Improper use of sick leave privileges; Cause 3 - Conduct unbecoming an officer or employee of the County; and Cause 4 - Failure of good behavior.

Employee has been employed as a Public Defender Investigator III, in the Department for approximately 18 ½ years and at the time of his removal, he was assigned to the Juvenile Delinquency Branch of the Department. Employee is an experienced and competent investigator as is apparent from the performance appraisal reports introduced at the hearing. On the day before the hearing, the Department filed an Amended Final Order of Removal and Charges to add a Cause for Insubordination, but it did not add any factual charges and the hearing officer rejected the Amended Order.

At the Commission hearing undisputed testimony and evidence confirmed the foundational facts and chronology set forth in the charges contained in the Final Order. Employee disputed the conclusions contained in the charges that the requested sick leaves were for the purpose of facilitating Employee's fishing business trips. Therefore, the core issue is whether the primary purpose of Employee's requests for sick leave were to facilitate those trips, or whether the trips were only incidental to the requests and were consistent with his physical condition. Employee's request was originally made for

vacation leave and changed to sick leave when the vacation leave was refused. The Department did not dispute that Employee had severely arthritic knees, and his Fitness for Duty Evaluation report also noted that his condition requires that he take 2-3 days off from work each month. Employee attempted to impeach the credibility of the Department's and the OIA's investigator and attempted to incorporate into his defense certain concepts from the Americans with Disabilities Act. However, the core issues in the Final Order of Removal pertained to the legitimacy and honesty of his utilization of sick leave.

Employee is an experienced and talented investigator the loss of whom is certainly felt by the Department. He clearly has severe knee problems. At least two doctors agreed with him that taking 2-3 days off from work each month, at least under some circumstances, was reasonable. The Department proved by a preponderance of evidence that Employee's sick leave requests coincided with his published fishing business trips, and that sick leave was invoked after requested vacation leave was refused due to Department needs. By placing the needs of his personal business over the needs of the Department, Employee not only engaged in the conduct set forth in the Causes contained in the Order of Removal, but also violated the County's policies regarding conflicts of interest. He has violated the public trust. The Department proved all of the charges contained in the Final Order of Removal. Employee is guilty of Causes I, II, III, and IV. It is therefore recommended that the Final Order of Removal and Charges be affirmed; that the Commission read and file this report; and that the proposed decision shall become effective upon the date of approval by the Civil Service Commission.

**Motion by Newman to approve Findings and Recommendations;
seconded by Austin. Carried.**

DISCRIMINATION

Findings

6. Commissioner Austin: J. Michael Roake, Esq., on behalf of **Jo Pastore**, Deputy Public Defender III, alleging retaliation discrimination by the Department of the Public Defender. (Continued from the Commission's March 19, 2003 meeting.)

FINDINGS AND RECOMMENDATIONS:

At the regular meeting of the Civil Service Commission on October 16, 2002, the Commission appointed Gordon Austin to investigate the complaint submitted by Jo Pastore, which alleged retaliation discrimination by the Department of the Public Defender. Ms. Pastore's initial request for review by this Commission included a Rule X (selection process) appeal, which had been held in abeyance pending the outcome of the discrimination investigation. The discrimination matter was concurrently referred to the Office of Internal Affairs (OIA) for investigation. OIA's investigation found probable cause of retaliation discrimination by the Department of the Public Defender against Ms. Pastore in denying her a promotion to the position of Deputy Public Defender IV.

The Civil Service Commission, at its regular meeting on February 5, 2003, concluded that probable cause exists regarding Ms. Pastore's allegations of retaliation discrimination and took formal action to pursue her discrimination appeal under the provisions of Rule VI (discrimination) of the Civil Service Rules. The Commission further granted Ms. Pastore's Rule X (selection process appeal), combining the Rule VI and Rule X hearings. Gordon Austin was assigned as the hearing officer to conduct the Rule VI and X hearing. The Commission's report was approved and filed with the appended OIA Final Investigative Report.

Subsequent to the Commission's February 5, 2003 action, and prior to the commencement of the hearing, settlement discussions between the Department, Appellant and her counsel J. Michael Roake continued, resulting in a written Settlement Agreement and Release signed by the parties and approved by County Counsel. Appellant filed a letter withdrawing her Rule VI (discrimination) and Rule X (selection process) appeals with the Commission Office on March 3, 2003. It is therefore recommended that the withdrawal of Appellant's discrimination complaint and selection process appeal based upon the Settlement Agreement and Release be accepted by the Commission; that the Commission read and file this report; and that this proposed decision shall become effective upon the date of approval by the Commission.

**Motion by Austin to approve Findings and Recommendations;
seconded by Pate. Carried.**

7. Commissioner Austin: **Ardyth Shaw**, Volunteer and Public Services Coordinator, Probation Department, alleging racial discrimination by the Probation Department. (See No. 8 below.)

FINDINGS AND RECOMMENDATIONS:

At the regular meeting of the Civil Service Commission on January 15, 2003, the Commission appointed Gordon Austin to investigate the complaint submitted by Complainant. The complaint was referred to the Office of Internal Affairs for investigation and report back. The matter was concurrently referred to OIA for investigation. The report of OIA was received and reviewed by the Investigating Officer, who concurred with the findings that there was no evidence to support Employee's allegations of racial discrimination by the Department of Probation, and that probable cause that a violation of discrimination laws occurred was not established in this matter. The Commission determined that an investigation under the provisions of Civil Service Rule XI is not warranted. It is therefore recommended that this complaint (Rule VI) and request for investigation (Rule XI) be denied; the Commission approve and file this report with a findings of no probable cause that Complainant has been discriminated against on any basis protected by law; and that the proposed decision shall become effective upon the date of approval by the Civil Service Commission.

**Motion by Austin to approve findings and recommendations;
seconded by Pate. Carried.**

AYES: Pate, Sandstrom, Austin, Casillas
NOES: None
ABSTENTIONS: Newman

INVESTIGATIONS

Requests

8. **Ardyth Shaw**, Volunteer and Public Services Coordinator, Probation Department, requesting an investigation into alleged improper personnel practices in the Probation Department. (See No. 7 above.)

RECOMMENDATION: Take action pending the outcome of the discrimination complaint.

Larry Cook, Executive Officer, recommended that Employee's request for an investigation (Rule XI) be denied due to OIA's report and the Commission's finding of no probable cause in Employee's Discrimination (Rule VI) matter above.

Motion by Sandstrom to deny investigation; seconded by Austin. Carried.

AYES: Pate, Sandstrom, Austin, Casillas
NOES: None
ABSTENTIONS: Newman

OTHER MATTERS

Seal Performance Appraisal

9. Wendell Prude, S.E.I.U. Local 2028, on behalf of **Dani Helton**, Revenue & Recovery Officer Trainee, Auditor and Controller, requesting the sealing of a Performance Appraisal for the period March 28, 2002 to June 28, 2002. (Continued from the Commission's March 19, 2003 meeting.)

RECOMMENDATION: Consider all written and verbal input.

Wendell Prude, SEIU Local 2028, Al Arocho, representing the Department and the Commission engaged in discussion regarding the sealing of this performance appraisal, as well as sealings in general. Commissioner Newman regarded the appraisal as fair, and though the Department made mistakes in the issuance, he strongly opposed the sealing.

Motion by Austin to seal performance appraisal; seconded by Pate.

Amended Motion by Sandstrom to document, via CSC Minutes, reason(s) for sealing of this appraisal, as well as future performance appraisal sealings. Seconded by Pate. Carried.

AYES: Pate, Sandstrom, Austin, Casillas
NOES: Newman
ABSTENTIONS: None

The sealing of Ms. Helton's performance appraisal is appropriate in view of the substantive and procedural errors which occurred during the review and appeal process, and which are concurred with by the Department.

10. Public Input.

ADJOURNMENT: 4:00 p.m.

NEXT MEETING OF THE CIVIL SERVICE COMMISSION WILL BE MAY 7, 2003.

* The identity of the peace officer is held confidential per Penal Code Section 832.7 (San Diego Police Officers' Association, et al. v. City of San Diego Civil Service Commission).